IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. EDO E. ASLANYAN, Appellant.	)	DIVISION ONE No. 63142-0-I UNPUBLISHED OPINION FILED: August 2, 2010

Dwyer, C.J.—Edo Aslanyan appeals from the judgment entered on the jury's verdict finding him guilty of assault in the first degree, contending that the prosecutor committed misconduct, that his trial counsel provided ineffective assistance, and that inaccuracies in an interpreter's translation of portions of a witness's Armenian-language testimony entitled him to a mistrial.[1] We affirm.

I

On December 24, 2007, Aslanyan repeatedly shot his acquaintance Tigran Koshkaryan following an altercation in a bar parking lot. Koshkaryan survived. The two men had agreed to meet at the bar to discuss a series of fights and arguments at a party Aslanyan hosted and Koshkaryan attended

[1] Aslanyan also argued that the 60-month sentence enhancement he received for using a firearm violated double jeopardy. In his reply brief, Aslanyan conceded it did not, based on our Supreme Court's recent opinions in State v. Kelley, 168 Wn.2d 72, 226 P.3d 773 (2010), and State v. Aguirre, 168 Wn.2d 350, 229 P.3d 669 (2010). Because those decisions dispose of Aslanyan's claim of error, we accept his concession.

several weeks earlier.

What occurred before the shooting was the subject of conflicting testimony. Each man claimed that the other was the first to become aggressive. Koshkaryan claimed that Aslanyan threw the first punch. Aslanyan claimed that Koshkaryan tried to rob him of a gold chain he wore, then punched and head-butted him, knocking him to the ground. When Aslanyan fell, his .40 caliber handgun fell from his waistband to the ground. Koshkaryan claimed that after seeing the gun, he reached into his pocket for his car keys, and turned to leave. Aslanyan claimed Koshkaryan reached into his jacket pocket and charged toward him, and he feared Koshkaryan was reaching for a weapon.

Aslanyan shot three times, striking Koshkaryan twice. Koshkaryan ran into the bar and collapsed. Aslanyan called 911 claiming that he had shot a man who tried to rob him. Aslanyan was arrested and later charged with assault in the first degree.

At trial, Aslanyan acknowledged shooting Koshkaryan, but maintained that he had done so in self-defense. The trial court instructed the jury on the lawful use of force in self-defense, and that self-defense was not available as a defense if Aslanyan's acts and conduct provoked or commenced the fight.

The jury convicted Aslanyan of assault in the first degree as charged, and found by a special verdict that Aslanyan was armed with a firearm at the time of the assault. The trial court imposed an exceptional sentence, finding that

Aslanyan's failed self-defense claim and the victim's role in the conflict justified a downward departure from the standard sentencing range.

II

First, Aslanyan argues that the prosecutor's references to remarks made by a guest at Aslanyan's party likely affected the jury's verdict. We disagree.

A guest at Aslanyan's December 2, 2007 party allegedly made anti-Semitic remarks toward another guest. A series of arguments broke out, and Koshkaryan got into two fights with Aslanyan's godson Eduard Vardanyan.[2]

At trial, the prosecutor (1) asked witnesses about the remarks at Aslanyan's party; (2) confronted a reluctant witness with his earlier inconsistent statement about the remarks; (3) argued that Aslanyan bore some responsibility for throwing a party that got out of control; (4) recounted the alleged content of the anti-Semitic remarks; and (5) explained that Aslanyan and Koshkaryan met at the bar to discuss the disagreements and fights at the party.

Although he did not object to any of these remarks at trial, Aslanyan now claims that the prosecutor's actions were so flagrant and ill-intentioned that no objection was required. We disagree.

In order to establish prosecutorial misconduct, a defendant must show that the prosecutor's conduct was both improper and prejudicial in the context of

[2] Aslanyan and his son Gregory testified that Koshkaryan armed himself with a knife before the second fight, but the other witnesses, including Eduard, testified that they did not see Koshkaryan holding a knife.

the entire record and the circumstances at trial. State v. Hughes, 118 Wn. App. 713, 727, 77 P.3d 681 (2003). Prejudice is established only if there is a substantial likelihood that the instances of misconduct affected the jury's verdict. State v. Pirtle, 127 Wn.2d 628, 672, 904 P.2d 245 (1995). In the absence of a proper objection interposed at trial, we review allegations of prosecutorial misconduct only where the challenged arguments were so flagrant and ill-intentioned that a proper curative instruction could not have ameliorated any resulting prejudice. State v. Stenson, 132 Wn.2d 668, 719, 940 P.2d 1239 (1997); State v. Russell, 125 Wn.2d 24, 86, 882 P.2d 747 (1994); State v. Padilla, 69 Wn. App. 295, 300, 846 P.2d 564 (1993).

Here, the prosecutor's acts were not flagrant and ill-intentioned. Aslanyan argues unpersuasively that the prosecutor's actions in this case are comparable to those at issue in State v. Belgarde, 110 Wn.2d 504, 755 P.2d 174 (1988); State v. Reed, 102 Wn.2d 140, 684 P.2d 699 (1984), and State v. Claflin, 38 Wn. App. 847, 690 P.2d 1186 (1984).[3] In those cases, unlike this case, the prosecutor's remarks were so inflammatory that there was a substantial likelihood that they affected the verdicts.[4] Belgarde, 110 Wn.2d at

[3] In Belgarde, the prosecutor asserted that the defendant belonged to a group of "butchers, that killed indiscriminately." Belgarde, 110 Wn.2d at 507 (reversing murder conviction). In Reed, the prosecutor told jurors defendant was a "liar" and a "manipulator," and called the defense team "a bunch of city lawyers" and defense witnesses a "bunch of city doctors who drive down here in their Mercedes Benz." Reed, 102 Wn.2d at 143–144 (reversing murder conviction). In Claflin, the prosecutor read a poem with "vivid and highly inflammatory imagery" written by a rape victim. Claflin, 38 Wn. App. at 850–51 (reversing multiple convictions of rape, assault, and indecent liberties).

[4] Unlike Aslanyan's trial counsel, Reed's and Claflin's trial counsel made timely objections to the arguments. Reed, 102 Wn.2d at 144; Claflin, 38 Wn. App. at 850–51.

508; Reed, 102 Wn.2d at 147–48; Claflin, 38 Wn. App. at 850-51.

The evidence and argument concerning a third party's anti-Semitic remarks were unlike the misconduct in Belgarde, Reed, and Claflin, because there was no suggestion that Aslanyan himself made any offensive remarks or harbored any objectionable beliefs, and the prosecutor never encouraged jurors to convict Aslanyan based on his alleged beliefs. Unlike the statements in Belgarde, Reed, and Claflin, the prosecutor's questions and argument concerned relevant evidence.[5] There was a close connection between the events at the party and the shooting.

Defense counsel's decision not to object or request a curative instruction in any of the numerous instances Aslanyan now challenges "strongly suggests to a court that the argument or event in question did not appear critically prejudicial to an appellant in the context of the trial." State v. Swan, 114 Wn.2d 613, 661, 790 P.2d 610 (1990).

The conclusion that the evidence was not unduly prejudicial to Aslanyan is reinforced by the fact that the evidence was a critical part of the defense strategy. Aslanyan's counsel argued that Koshkaryan was not credible, given his violent behavior at the party and his testimony minimizing that behavior. Counsel also used the evidence to argue that Koshkaryan was the first aggressor in the parking lot, allowing Aslanyan to claim self-defense. The

[5] Aslanyan's counsel expressly argued that the fight at the party was relevant: "It just sort of sets the stage. The real act happened right in the parking lot next to the truck. But it sets the stage."

evidence supported the argument that Koshkaryan had a propensity to be violent, and had carried a grudge when he went to meet Aslanyan. Given this context, the prosecutor's remarks caused little, if any, prejudice to Aslanyan.

Moreover, the trial court instructed jurors that (1) the only evidence it was to consider was testimony from witnesses and the admitted exhibits; (2) the jurors were the sole judges of the credibility of each witness; (3) the lawyers' statements were not evidence; (4) the jurors must disregard any remark, statement, or argument that is not supported by the evidence; and (5) that the jurors must reach their conclusion based on the facts proved to them and the law given by the trial court, and not on sympathy, prejudice, or personal preference. We presume the jury follows the court's instructions. State v. Johnson, 124 Wn.2d 57, 77, 873 P.2d 514 (1994).

Aslanyan has not demonstrated that the remarks were flagrant and ill-intentioned, or that further curative instructions to the jury would have been ineffective. Accordingly, he has waived the ability to raise this issue on appeal. Even if he had not waived the issue, there was no likelihood that the remarks affected the verdict. Appellate relief is not warranted.

III

Next, Aslanyan claims that he received ineffective assistance of counsel because his attorney did not object to the prosecutor's argument. We disagree.

To establish ineffective assistance of counsel, a defendant must show

both deficient performance and resulting prejudice. Strickland v. Washington, 466 U.S. 668, 687, 104 S. t. 2052, 80 L. Ed. 2d 674 (1984). Deficient performance occurs when counsel's performance falls below an objective standard of reasonableness. Stenson, 132 Wn.2d at 705–06. A strong presumption of effective assistance exists, and the defendant bears the burden of demonstrating an absence in the record of a strategic basis for the challenged conduct. State v. McFarland, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995). Prejudice occurs if there is a reasonable probability that the outcome of the proceedings would have been different had counsel's performance not been deficient. McFarland, 127 Wn.2d at 335. Failure to establish either prong of the test is fatal to the claim of ineffective assistance of counsel. Strickland, 466 U.S. at 697.

Defense counsel's decision to refrain from objecting during the prosecutor's closing argument was not deficient performance. Lawyers do not commonly object during closing argument "'absent egregious misstatements.'" In re Pers. Restraint of Davis, 152 Wn.2d 647, 717, 101 P.3d 1 (2004) (quoting United States v. Necoechea, 986 F.2d 1273, 1281 (9th Cir.1993)). "A decision not to object during summation is within the wide range of permissible professional legal conduct." Davis, 152 Wn.2d at 717 (citing Strickland, 466 U.S. at 689).

Aslanyan's counsel made a reasonable strategic decision not to object to

the remarks Aslanyan now challenges. The prosecutor's argument dealt with themes that also reasonably supported Aslanyan's defense theory. It was a legitimate defense strategy to allow the jury to consider the evidence surrounding Koshkaryan's earlier fights, and the arguments that Koshkaryan came to speak with Aslanyan about the events at the party the night he was shot. The fights at Aslanyan's party showed Koshkaryan's propensity to be violent, and supported the inference that Aslanyan shot him in self-defense.

Aslanyan's trial counsel had legitimate strategic reasons for not objecting to the prosecutor's remarks. Aslanyan fails to demonstrate he received ineffective assistance of counsel. State v. McNeal, 145 Wn.2d 352, 362, 37 P.3d 280 (2002).

IV

Aslanyan next claims that the trial court abused its discretion by denying his motion for a mistrial, after the interpreter assisting Koshkaryan "failed to accurately interpret the victim's testimony" and "fail[ed] to translate the victim's animosity towards defense counsel." We disagree.

The trial court is in the best position to determine if a trial irregularity caused prejudice. State v. Weber, 99 Wn.2d 158, 165–66, 659 P.2d 1102 (1983). We review a trial court's decision to grant or deny a motion for a mistrial for abuse of discretion. State v. Rodriguez, 146 Wn.2d 260, 269, 45 P.3d 541 (2002). A reviewing court will find abuse of discretion only when "'no reasonable

judge would have reached the same conclusion.'" Rodriguez, 146 Wn.2d at 269 (quoting State v. Hopson, 113 Wn.2d 273, 284, 778 P.2d 1014 (1989)). The court should grant a mistrial "only when the defendant has been so prejudiced that nothing short of a new trial can insure that the defendant will be tried fairly." State v. Mak, 105 Wn.2d 692, 701, 718 P.2d 407 (1986).

The majority of Koshkaryan's testimony was conducted in English. A portion of his testimony required his use of a court-provided Armenian-language interpreter. After Koshkaryan testified, Aslanyan complained to the trial court that the interpreter omitted two of Koshkaryan's statements that were derogatory to Aslanyan's counsel, and failed to accurately translate other of Koshkaryan's statements.

After trial testimony was completed on December 2, 2008, the trial court ordered a continuance until a record of the challenged testimony could be obtained. On December 15, Aslanyan produced an enhanced version of the audio recording and a transcript.

The trial court concluded there was an insufficient basis for a mistrial. The court found that the majority of the alleged discrepancies were "minor in the context of the evidence." The court found that two comments Koshkaryan made to the interpreter expressing annoyance with Aslanyan's trial counsel were potentially significant.[6] The court offered to read the two potentially significant

[6] When Aslanyan's trial counsel asked Koshkaryan repeatedly about his bullet wounds, Koshkaryan said to the interpreter: "[D]oesn't dummy get it?" and "Mama Mia, or Oh My God."

questions and Koshkaryan's answers to the jury. Both the prosecutor and defense counsel agreed with the proposed remedy. The trial court read the testimony before closing argument.

The trial court acted well within its discretion in concluding that any potential prejudice to Aslanyan was minimal, and in denying his motion for a mistrial. The trial court's corrective action, with which his trial counsel agreed, supplied the content Aslanyan claimed was missing from the translation. And unlike an appellate court, the trial court and the jurors were able to observe Koshkaryan's demeanor on the witness stand and make their own determinations about his credibility.

Aslanyan fails to establish any abuse of the trial court's discretion.

V

Aslanyan contends that all of the assignments of error that he has raised on appeal constitute cumulative error, entitling him to a new trial. Having failed to establish that any prejudicial error occurred, Aslanyan has also failed to satisfy his burden of demonstrating the existence of cumulative error warranting reversal. In re Pers. Restraint of Lord, 123 Wn.2d 296, 332, 868 P.2d 835 (1994).

VI

Finally, Aslanyan raises numerous issues in his Statement of Additional Grounds for Review. None has merit.

Aslanyan's complaint that the charging document and jury instructions were not identical in defining the crime fails to recognize that assault in the first degree is an offense that can be committed by alternative means, and both the information and the instruction are proper. RCW 9A.36.011. Alternative means statutes identify a single crime and provide more than one means of committing that crime. In re Det. of Halgren, 156 Wn.2d 795, 809, 132 P.3d 714 (2006); State v. Arndt, 87 Wn.2d 374, 376–77, 553 P.2d 1328 (1976).

Similarly Aslanyan's arguments that the jury instructions were inconsistent and failed to require unanimity are baseless. Unanimity is not required as to each of the alternative means by which the crime was committed, provided there is substantial evidence presented to support each alternative means charged. State v. Linehan, 147 Wn.2d 638, 645, 56 P.3d 542 (2002). Here, there was evidence both that he used a deadly weapon, and that he caused great bodily harm. The instructions were proper.

The information was sufficiently specific as to the manner in which Aslanyan inflicted great bodily harm, contrary to his assertion. For an information to be constitutionally adequate, all essential elements of the crime must be included in the charging document. State v. Kjorsvik, 117 Wn.2d 93, 101–02, 812 P.2d 86 (1991). The information satisfies this requirement.

Aslanyan's argument that the information improperly charged him with using a firearm in the commission of the crime is also without merit. Use of the

firearm was an element of the underlying assault and a basis for a sentence enhancement. RCW 9A.36.011; RCW 9.94A.533; State v. Kelley, 168 Wn.2d 72, 78–79, 226 P.3d 773 (2010); State v. Aguirre, 168 Wn.2d 350, 367, 229 P.3d 669 (2010).

Aslanyan's argument that the trial court erred in giving a first-aggressor instruction is also incorrect. A court may give an aggressor instruction if there is credible evidence from which a jury could reasonably determine that the defendant provoked the need to act in self-defense. State v. Riley, 137 Wn.2d 904, 909–10, 976 P.2d 624 (1999). Koshkaryan's testimony that Aslanyan punched him first met this requirement.

Aslanyan's remaining arguments regarding the prosecutor's argument and his counsel's trial strategy likewise do not warrant appellate relief.

Affirmed.

Dwyer, C.J.

We concur:

Appelwick, J.

Lau, J.